IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 52 of 1982

Between:

ALI'S MOTORS LTD. Appellant

and

THE NATIONAL INSURANCE CO. OF FIJI LTD. Respondent

S. M. Koya for the Appellant
P. I. Knight for the Respondent

Date of Hearing: 17th March, 1983

Delivery of Judgment: 23rd March, 1983

JUDGMENT OF THE COURT

Quilliam J.A.

This is an appeal from the decision of the Supreme Court on a claim under an insurance policy.

The appellant carries on business at Nausori as motor repairers and businesses incidental thereto. In March 1980 it took insurance cover with the respondent under a number of policies.

One of them was a cover for $80,000 on a building. That policy was for the period from the 20th March, 1979, to the 20th March, 1980. It was accepted by the respondent that the premiums upon all the appellant's policies should be paid by instalments, and payment was in fact made by three equal instalments in July, August and September 1979.

In March 1980 the policies were automatically renewed for a further year although the appellant had not paid the renewal premiums. Although there were some small payments made by the appellant the learned Judge found as a fact that no payment at all was made in respect of Policy No. 443385, which was the policy on the building in question, and there was ample evidence to support that finding. That policy provided that it was a condition precedent to liability on the part of the respondent that the appellant should have paid the premium, but it is clear that the respondent, for a time at least, waived compliance with that requirement and was prepared to allow credit to the appellant.

The Australia and New Zealand Banking Group was the mortgagee of the appellant in respect of the building and there was in existence between the respondent and the Bank what was known as a "concession agreement." This was an agreement under which the respondent undertook to notify the Bank of non-payment of a premium so that the Bank had an opportunity to arrange for payment in order to protect its interest as mortgagee.

On the 30th June, 1980, the respondent wrote to the appellant pointing out that payment of the premium on Policy No. 443385 had not been made and asking for payment. On the 25th July, 1980, the respondent wrote to the Bank giving notice of non-payment and saying that unless payment was received by the 25th August, 1980, the policy would be cancelled. A copy of that letter was sent to the appellant.

The learned Judge found as a fact that there was no proof either of these letters was received by the appellant.

There are two further findings of fact of particular significance. The first was that Mr. Sharma, who at the time was in charge of the Nausori branch of the Australia and New Zealand Bank, had spoken to one of the appellant's directors, Mr. Hassan, regarding renewal of the policy in question. He was told by Mr. Hassan not to worry about renewal because arrangements had been made with another insurance company, namely the United Insurance Company. He was told further that the appellant was not going to pay the premium on the respondent's policy. There was some uncertainty on Mr. Sharma's part as to the date of this conversation. At first he put it at March, 1980 but later accepted that it may have been October, 1980.

The second significant finding was that an employee of the respondent, Mr. Adam had called to see another of the appellant's directors, Mr. Mumtaz Ali towards the end of October, 1980. He told Mr. Ali that the premiums were well overdue. Mr. Ali's response was that he was no longer interested in the National Insurance Company and had taken out insurance with the United. The learned Judge also held that the appellant did indeed insure the same building for $80,000 with the United Insurance Company in September 1980.

On the 1st November, 1980, the building was damaged by fire and that damage was assessed at $75,000. The appellants claimed against the respondent for indemnity under Policy 443385. The respondent denied liability on the ground that the policy had been cancelled before the fire occurred. The learned Judge dismissed the claim. He based his decision mainly on a finding that the appellant had cancelled the policy. In the alternative he found that, in any event, the non-payment of the premium was a fundamental breach of the contract.

47

252

We are satisfied this appeal is properly to be determined upon the basis of the findings of fact made by the learned Judge to which we have referred.

In Chitty on Contracts, General Principles, 24th Edition, there appears the following at p. 697, para. 1479:

> "A renunciation of a contract occurs where one party, by words or conduct, evinces an intention not to continue to perform his part of the contract. But not every refusal to perform some part of a contract will amount to a renunciation. Even a deliberate breach will not necessarily entitle the innocent party to treat the contract as at an end, since it may sometimes be that such a breach can appropriately be sanctioned by damages. If the contract is entire and indivisible, that is to say, if it is expressly or impliedly agreed that the obligation of one party is dependent or conditional upon a complete performance by the other, a refusal to perform any part of the agreement will normally entitle the party not in default to treat himself as discharged from liability.
> ... If there is an absolute refusal to perform, the other party may treat the contract as at an end. Short of an express refusal, however, the test is to ascertain whether the action or actions of the party in default are such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions. The renunciation is then evidenced by conduct.."

See also 9 Halsbury 4th Edition, p. 375, paras. 546-547.

It is clear that, upon the facts as found by the learned Judge there was an express refusal by the appellant to perform its part of the contract of insurance. For a time after the date of renewal there was a waiver by the respondent of the condition precedent in the policy as to payment. In the previous year payment had been accepted by instalments. If there had been any payment on account of the premium for the 1980/81 year then it may well have been the case that no cancellation or renunciation would have been involved.

The learned Judge held, however, that there had been no such payment and we are satisfied he was entitled to make that finding. The only payments made by the appellant in that year were related to other policies.

The position, then, was that a similar cover on the building, namely for $80,000 was taken out by the appellant with the United Insurance Company, no part of the premium payable to the respondent had been paid about eight months after renewal date, and two of the appellant's directors stated that, because of the United policy, renewal was not required and the premium would not be paid. This was an express renunciation of the contract which the respondent was entitled to accept and which it did accept.

This was the view reached by the learned Judge and we have no doubt he was correct.

The appeal is dismissed with costs.

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Vice President

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Judge of Appeal

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Judge of Appeal